

April 9, 2014

**RESS & COURIER**

Ontario Energy Board  
P.O. Box 2319  
27th Floor  
2300 Yonge Street  
Toronto, Ontario M4P 1E4

Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**Re: EB-2014-0139 – Jericho Wind, Inc. (“Jericho”) Section 41(9) Application (the “Application”) – Response to the March 28, 2014 Letter from the Corporation of the County of Lambton (the “County”)**

We are counsel to Jericho in the above noted proceeding. We are writing in response to the County’s March 28, 2014 letter, and have addressed below the key issues raised in that letter. This letter is without prejudice to any position Jericho may later make about the proper timing, process or forum for raising these issues.

**1. County’s request for intervenor status**

Jericho has no objection to the County’s request to be granted intervenor status.

**2. County’s request to dismiss portions of the proposed proceeding**

In its letter, the County asks the Board to dismiss or not process any portion of the Application that exceeds the immediate jurisdiction of the Board. Jericho is aware of the Board’s limited jurisdiction in section 41(9) proceedings; in its Application, Jericho clearly states that, because of the limited scope of section 41(9), the only issue before the Board is determining the location of Jericho’s distribution facilities within the County’s road allowances.<sup>1</sup> The Board has also acknowledged this scope in prior Decisions and Orders.<sup>2</sup> Therefore, Jericho would not expect the proceeding to consider or determine any matters that fall outside of this well-understood scope. For example, Jericho would expect that certain matters raised in the County’s letter to be outside the scope of the present proceeding, including the following issues raised in section 5 of the County’s letter:

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<sup>1</sup> See, for example, pages 3-4 of Exhibit A, Tab 3, Schedule 1 of the Application.

<sup>2</sup> See, for example, page 4-5 of the Board’s Decision and Order in EB-2013-0233.

- how the location of the distribution facilities would affect the broader road use agreement being negotiated between the County and Jericho (the “RUA”). As set out in Exhibit B, Tab 4, Schedule 1 of the Application, only one aspect of the RUA deals with the location of distribution facilities. Most of that agreement is irrelevant to the specific issue of the location of distribution infrastructure; and
- how Jericho’s decision to use the County road allowances would impact the County’s road allowances generally. Under section 41 of the *Electricity Act, 1998*, Jericho has the right to locate its distribution facilities within the County’s road allowances, and the decision to do so is not a proper subject of the proceeding.

In any event, based on the County’s comments in section 2 of its letter, it appears that the County and Jericho are in agreement that the scope of this proceeding should be limited to determining the location of Jericho’s distribution facilities within the County’s road allowances.

### **3. County’s request to delay the proceeding pending the County’s sixty day public consultation process on the RUA**

The County seeks to extend the timeline of the hearing in order to accommodate County’s sixty day public consultation process on the proposed RUA. In our view, there is no basis for scheduling the hearing on the present Application to accommodate public comment on the RUA.

As noted above, the RUA largely concerns matters that are irrelevant to the specific issue of the distribution facility location. As stated in the Application, it is necessary for Jericho to reach agreement with County specifically regarding the location of the distribution facilities as soon as possible in order to maintain its construction schedule.<sup>3</sup> As a result, adjourning the Application pending the outcome of a consultation process that is mostly unrelated to the Application would significantly prejudice Jericho.

Moreover, in our view, the County cannot constructively refuse to reach an agreement with Jericho, and then be allowed to delay the Board’s consideration of the matter. As set out in Exhibit B, Tab 5, Schedule 1 of the Application, Jericho has an extensive track record of consultation with County staff on the location of the distribution facilities<sup>4</sup>, and has satisfactorily responded to their questions, as evidenced by the County staff’s January 15, 2014 and February 19, 2014 recommendations. Despite these recommendations, Council Committee decided not to recommend the authorization of the execution of the RUA but rather to recommend posting the current version for sixty days of public comment. Furthermore, the County also refused to reach an agreement with Jericho on the specific issue of the distribution system location, separate and apart from any RUA discussions. As set out in Exhibit B, Tab 5, Schedule 1 of the Application, in Jericho’s February 28, 2014 letter to the County, Jericho requested that the County engage directly on this issue, even while the consultation on the broader RUA went forward. The County did not accept this offer, but rather constructively refused to reach an agreement with Jericho on the location of the distribution system, thereby forcing the need for this Application. The County did so even after fair warning from County staff and Jericho that the Application

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<sup>3</sup> See paragraph 9 of Exhibit A, Tab 2, Schedule 1 of the Application.

<sup>4</sup> Note that this consultation took place with County staff, as Jericho was specifically instructed to deal with County staff on the distribution location issue.

would be filed if County would not engage in constructive negotiations.<sup>5</sup> Therefore, we respectfully submit that the County cannot be allowed, after refusing to resolve the location issue with Jericho, to delay the Board's consideration of the matter. As mentioned above, allowing the County to do so would significantly prejudice Jericho.

Finally, this proceeding does not preclude parties who participate in the County's RUA public consultation process from also participating in this process. To the extent those parties are directly impacted by the proposed location of Jericho's distribution facilities in County road allowances, they can make their views known directly to the Board in this proceeding. Thus, their right to due process is still maintained should they wish to exercise it.

#### **4. County's request for an interrogatory process or a technical conference**

In its letter, the County requests the opportunity to submit written interrogatories. We have no objection to parties to the present proceeding, as well as Board staff, being given the opportunity to ask written interrogatories in respect of any evidence filed in the proceeding, to the extent those questions are relevant to the scope of the Application. The opportunity to file and respond to written interrogatories is now a standard part of any section 41(9) proceeding.<sup>6</sup> Jericho only requests that any interrogatory process be expedited given the discrete issue that is the subject of the Application, and given that County staff have already had a significant amount of time to review and comment on Jericho's proposed distribution facility locations – and has, in fact, recommended the approval of those locations as part of a RUA.<sup>7</sup>

In addition or in the alternative to written interrogatories, the County also requests a technical conference. We respectfully do not consider a technical conference to be necessary in this proceeding. To our knowledge, a technical conference has never been held in the context of a section 41(9) proceeding. The issues at hand are discrete and, as mentioned above, County staff (and County Council, had it chosen to) have had considerable time to review Jericho's proposed location and to ask any clarifying questions. In its letter, the County simply suggests that a technical conference would greatly simplify the proceeding, but does not substantiate this assertion. In our view, written interrogatories would provide sufficient opportunity for any parties to ask the clarifying questions they had in mind, and the interrogatory process has been sufficient for this purpose in the past.

#### **5. County's request for an oral hearing**

The County submits that the Application should proceed by way of oral hearing. Jericho respectfully disagrees. Jericho is of the view that the most effective way to deal with the issues raised by the Application is by way of written hearing. To our knowledge, a section 41(9) application has never been heard by way of oral hearing, in large part given the discrete nature of the issues, which the County points out in section 2 of its letter. The County has not provided any reasons why this section 41(9) proceeding should be distinguished from others in that regard.

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<sup>5</sup> See, for example, County Staff's February 19, 2014 report recommending approval of the RUA and Jericho's February 28, 2014 letter to the County, which both indicate that Jericho would have no choice but to file the Application if the County would not reach an agreement on the distribution system locations.

<sup>6</sup> See, for example, the Board's Procedural Orders in EB-2013-0366 or EB-2013-0233.

<sup>7</sup> See Exhibit B, Tab 5, Schedule 1 of the Application.

Furthermore, the County's arguments for an oral hearing are not compelling and do not demonstrate that the issues relevant to the proceeding cannot be adequately considered by way of a written proceeding. Essentially, the County's arguments for an oral hearing are: (1) the evidence will be conflicting on a number of points, (2) cross-examination would have a high probative value, and (3) an oral hearing would be more expeditious than written submissions.

Regarding (1), it is important to note that there may not be conflicting evidence. As mentioned above, Jericho's proposed distribution facility locations were recommended by County staff as part of their recommendation that Council approve the RUA. In any event, should the County file a competing proposal for the location of the distribution facilities – i.e. a proposal that would be inconsistent with that recommended by County staff – then any questions regarding that proposal could be addressed through written interrogatories, and the merits of each proposal could adequately be argued through written submissions.

Regarding (2), it is unclear why cross-examination would have any higher probative value than written interrogatories. The County simply states that it is important for the Board to hear the parties respective positions with regard to a number of issues, which are arguably irrelevant to the limited scope of this proceeding (see section 1 above) and which, in any event, could be easily addressed through written submissions. Furthermore, the nature of the issue at hand – the location of distribution facilities – lends itself to written rather than oral examination given that written responses can more readily involve maps and other visual aids that will assist the Board in distinguishing any competing proposals. Finally, the County's argument that oral examination is necessary to assess the credibility of engineering evidence is again not supported by any strong rationale. The County has not explained why the Board or the parties to the proceeding could not engage their own technical experts to evaluate any engineering evidence brought forth in the hearing. Thus, in this present proceeding, an oral hearing would likely have no more than (and possibly less) probative value than a written hearing. In that case, we respectfully submit that it would be inappropriate to proceed by oral hearing when doing so would have a greater prejudicial effect on Jericho, as discussed in the next paragraph.

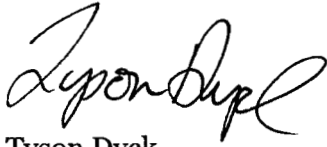
Regarding (3), the County's assertion that an oral hearing will be more expeditious than a written one is an empirical statement that does not appear to be borne out by the evidence, since we are not aware of an oral hearing having been conducted for a section 41(9) proceeding. We also understand that in other types of proceedings oral hearings on average take longer than written hearings, which would prejudice Jericho, given the fact that a timely resolution of this matter is important for Jericho's construction schedule.<sup>8</sup> Therefore, given that an oral hearing does not appear to have any greater probative value, the prejudice it would likely cause Jericho in our view makes it clear that the Application should proceed by written hearing. We respectfully submit that a written hearing will be the most administratively efficient and procedurally clear for all parties.

Please feel free to contact me with any questions.

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<sup>8</sup> See paragraph 9 of Exhibit A, Tab 2, Schedule 1 of the Application.

Yours truly,

A handwritten signature in black ink, appearing to read "Tyson Dyck". The signature is fluid and cursive, with the first name "Tyson" being more prominent than the last name "Dyck".

Tyson Dyck

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